Supreme Court of the United States

PABLO [illegible]

BINGER [illegible]

REPLY BRIEF FOR THE APPE[illegible]

In the Supreme Court of the United States,

OCTOBER TERM, 1901.

NO. 226.

PABLO MAESE, JOSE L. LOPEZ, DIONICIO GONZALES, AND JESUS MARIA TAFOYA, Appellants.

vs.

BINGER HERMANN, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE UNITED STATES, AND ETHAN ALLEN HITCHCOCK, SECRETARY OF THE DEPARTMENT OF THE INTERIOR OF THE UNITED STATES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

REPLY BRIEF FOR THE APPELLANTS.

Counsel for the appellees presents his arguments under four separate heads, making four sub-divisions of his fourth general proposition, as follows:

1. Complainants not entitled to equitable relief.
2. The Supreme Court of the District of Columbia was without jurisdiction.
3. There is a fatal defect of parties.
4. Apart from the matters before discussed, complainant's case is without merit.

Sub-divisions of the fourth proposition.

A. The court will not accept complainant's statement of the effect of the act of June 21, 1860.

B. A consideraion of the act of June 21, 1860, and of other matters of which the court takes judicial notice, shows that the claim in question was confined to the town of Las Vegas.

C. That the town of Las Vegas is the confirmee designated by Congress is believed to be clearly shown in the following departmental decisions relating to this claim.

4. Confirmatory patent must follow act of confirmation. Neither Land Department nor courts can revise action of Congress.

REPLY.

To a very large extent each and every of the above propositions has been anticipated in our brief now on file, but we will supplement that by a brief reply to the argument of appellee's counsel taking his propositions up in their order.

I.

COMPLAINANTS NOT ENTITLED TO EQUITABLE RELIEF.

In support of this proposition counsel for appellees says: They have failed to make it appear that the action which they seek to prevent will work any serious harm to them or any injury for which an adequate remedy cannot be obtained in a court of law. They do not present a condition which entitles them to the writ of injunction.

That statement is followed by quoting section 2447 of the Revised Statutes and section 4 of the act of June 21, 1860, and then it is asserted that "it is immaterial whether the patent in this case is isued under section 2447, Revised Statutes, or under the act of March 3, 1869. The character of the duties to be performed and the effect of the patent to be issued are the same. In neither case would any valid adverse right of

any person be affected. And such right could be asserted before any proper tribunal just as effectually as if such patent had not been isued."

This court discussing the act of June 21, 1860, in the case of Shaw *vs.* Kellogg, said: "There was not at the time of these transactions and has not since been any statute specifically authorizing a patent for this land" (meaning that selected by Baca heirs in lieu of the Las Vegas grant). "Section 2447, Rev. Stat." (taken from the acts of 1854, 10 Stat. At. L. 599, chap. 10), applies only to the case of a claim to land "which has heretofore been confirmed by law."

The Los Trigos grant was confined by the act of June 21, 1860, and the Secretary of the Interior on April 6, 1892, ordered that patent be "issued in accordance with the provisions of section 4, act of March 3, 1869 (14 Stat. 342)" 14 L. D. 355-358.

In support of our position that the patent in this case must be issued under the act of March 3, 1869, we beg to submit the following extract from the report of the House Committee on the bill which became the act of March 3, 1869:

> Public policy, as well as justice to the individual, alike require that the rights of property should be settled and known; that titles to real estate, especially, should be clear and perfect, and where possible all clouds or defects be removed.
>
> Accompanying this report is a bill, the passage of which we recommend which provides for such confirmation, not by granting to the claimants a fee-simple estate in those lands, but simply by way of quit-claiming on the part of the United States to the *heirs of the original grantees.* That is all that in the opinion of your committee, is required under our treaty with Mexico, and all that is necessary to make a perfect title in the absence of any adverse claims; and should there be any such adverse claims the parties are left, under the proposed legislative action, to seek their remedies in the proper judicial tribunals of the country.
>
> The bill herewith reported also provides for the issuing of a patent in each case. It is not assumed that a patent is at

all necessary in order to confer or confirm title in these cases, for we are aware that our Supreme Court has decided that confirmation by act of Congress, and approved survey under it, are sufficient evidence of title without any patent; but we believe it due to these claimants, whose original title papers have heretofore been surrendered to our government, that they should not be put to the trouble of providing, each for himself or herself, a copy of the treaty of Guadalupe Hidalgo, of the act of Congress of July, 1854, of the act of Congress confirming such title and the survey under it, in order to feel assured that the lands which in some of these cases have been in the possession of these claimants or their ancestors for 100 years, is really their property. As American citizens they are entitled to a simpler evidence of title, and such as is given to our citizens who acquire real estate from the Government by the various modes provided by our laws.

In some of the acts heretofore passed, in reference to lands under said treaty with Mexico, patents have been required to be issued, while in others this has been overlooked; hence we provide furthermore in this bill that in all cases in which confirmation has been had, without the issuing of any patent, such patents shall be issued, thus placing all claims under said treaty upon an equal basis.

Reports of Committees on Private Land Claims.
Mis. Doc. 81, Part 3, 1879.

The office of a patent to a confirmed land grant serves as documentary evidence of a complete and perfect title. The act of confirmation recognizes the validity of the claim, and operates to transfer to the confirmees all estate or interest in the lands which the United States as the sovereign power could have. A patent issued upon the confirmation of a claim of a previously existing title is documentary evidence, having the dignity of a record of the existence of that title.

The patent is of great value to the confirmees, as it enables them without other proof to maintain their title in the tribunals of the country, and being founded on a survey by the government, it removes all doubt as to the boundaries of the tract, and in this way proves an instrument of quiet and

security, but it does not add anything whatever to the title or interest vested by the act of confirmation.

Langdeau *vs.* Hanes, 21 Wall. 521.

Wright *vs.* Roseberry, 121 U. S. 488.

Monroe *vs.* Whitney, 95 U. S. 551.

Same case in 112 U. S. 963.

Ryan *vs.* Carter, 93 U. S. 78.

Same case in 112 U. S. 963 (Book 28, 871).

Ryan vs. Carter, 93 U. S. 78 (Book 23, 807).

The case of Tubbs *vs.* Wilhoit, 138 U. S. 134, was an action for the possession of a tract of land in California. Tubbs asserted title to the land under a patent of the United States issued to him in October, 1879, upon a homestead entry made by him in May, 1873.

Kile, through whom Wilhoit claimed, derived his title through a patent from the state of California, the land having been certified to the state as swamp and overflowed lands, under the act of Congress of September 28, 1850, which act granted to the several states of the Union all the swamp and overflowed lands within their limits, which on the passage of the act remained unsold, and made it the duty of the Secretary of the Interior, as soon as practicable to make out an accurate list and plats of the land described, and transmit the same to the governors of the states and upon their request to cause patents to be issued to the states therefor.

July 23, 1866, an act was passed entitled "An act to quiet land titles in California," by which among other things the provisions of the original act of 1850 for the identification of swamp and overflowed lands in that state were changed. Their identification was no longer left to the Secretary of

the Interior, but was made subject to the joint action of the state and the federal authorities. The 4th section of that act provides as follows:

"That in all cases where township surveys have or shall hereafter be made under authority of the United States and the plats thereof approved, it shall be the duty of the Commissioner of the General Land Office to certify over to the state of California as swamp and overflowed all the lands represented as such, upon such approved plats, within one year from the passage of this act, and within one year from the return and approval of such township plats. It was held by the court:

1. That the swamp land act of 1850 imported a present grant to the states, and the title to the land passed to the states at once, their identification to be made by the Secretary of the Interior, but when identified the title to relate back to the date of the act.

2. By the act of 1866 the provisions of the act of 1850 for the identification of the swamp lands in California were changed, and where township plats were made and approved, it was made the duty of the Commissioner of the General Land Office to certify over to that state as swamp all the lands represented as such upon such approved plats.

The Commissioner of the General Land Office had refused to certify the lands as swamp and overflowed to the state of California, upon the idea that the plats and surveys of the swamp lands had not been approved, but the court held that the act of 1866 did not require approval by the commissioner of the General Land Office of the township plats which had been made and approved by the Surveyor General of the United States for California.

And then proceeded to say:

"Whether the township plat be considered as approved by the action of the Surveyor General or by the subsequent recognition of its correctness by the Commissioner of the General Land Office, when approved, the duty of the Com-

missioner to certify over to the state the lands represented thereon as swamp and overflow was purely ministerial. He could not defeat the title of the state by withholding such certificate, nor could he add to the title by giving it. Its only effect would have been to facilitate the proof of the vesting of the title in the state by its additional recognition of the land as that covered by the Congressional grant of 1850. It would not have added to the completeness of the title. A strange thing it would be if the refusal of an officer of the Government to discharge a ministerial duty could defeat a title granted by an act of Congress, and enable him to transfer it to parties not within the contemplation of the government."

In the case of the Board of Liquidation of La. *vs.* McComb, 92 U. S. 531, Justice Bradley, speaking for the court, said:

It has been well settled that when a plain official duty requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other.

To the same effect is Noble *vs.* Union Logging Rd. Co., 147 U. S. 165.

A patent of this grant should serve as documentary evidence of the previously existing title of the grantees, and that the land has been surveyed, and the survey approved, thus removing all doubts of the boundaries of the tract, and if issued to the original grantees or their legal representatives, will inure to the benefit of all representatives of the grantees of the land by contract, such as assignees, as well as by operation of law.

Carpenter *vs.* Rannells, 19 U. S. 138.

But if the patent shall be issued to any other than the original grantees, or their legal representatives, for instance, the town of Las Vegas could not inure to the benefit of the original grantees, or their representatives, and in order to protect their interests they would be compelled to file a bill in equity to have the patentee declared a trustee for their benefit. It is conceded that the town of Las Vegas was not the original grantee, nor is there any pretense that there was any such town until after the grant was made. A patent to the town of Las Vegas would cast a cloud upon the title of the repretsentatives of the original grantees, and would deprive them of what the law declares to be an "instrument of quiet and security."

Langdeau *vs.* Hanes, *supra.*

We submit that the foregoing is a complete and full answer to appellees' first contention.

II.

THE SUPREME COURT OF THE DISTRICT OF COLUMBIA WAS WITHOUT JURISDICTION.

Under this head the appellees say:

That the duties to be performed by the officers of the Land Department in connection with this grant involved the exercise of discretion and were, therefore, not merely and purely ministerial in character, is abundantly demonstrated by the facts. Two parties, the town of Las Vegas and Marcos Maese and others, as original grantees or their representatives, applied for patent. To ascertain the merits of the claims thus presented, required investigation extending not only to the confirmatory act, but to the report of the surveyor-general referred to in said act, and all the documents accompanying that report. * * *

Can it be said that these acts were merely ministerial?

We reply yes. We say that everything that the Commissioner of the General Land Office was required to do in

order to the issuing of the patent was purely a ministerial act, and we also say that it was his duty to examine the original title papers accompanying the report of the Surveyor General, and his report, and the confirmatory act, and to issue the patent accordingly. We concede also that the main questions involved in Stoddard *vs.* Chambers, 2 How. 284, and United States *vs.* Stone, 2 Wall. 525, were not the "controlling of the action of executive officers in the issuing of patents." But whether the act of issuing a patent was ministerial or judicial was involved in the solution of the questions under discussion in both of those cases. The court defined what a patent of a confirmed grant is, and in doing so, declared the character of the act in issuing it. The court said: "The patent is but evidence of a grant, and the officer who issues it acts ministerially and *not judicially.*"

Is it contended that that is not a correct statement of the law?

Justice Baldwin, in Grignon *vs.* Astor, 2 How. 319, in discussing the character of a patent issued upon a Spanish grant says: "The patent was only the act of its ministerial officers."

Chief Justice Waite, in his dissenting opinion in United States *vs.* Schurz, says:

> I agree that when the right to a patent has become complete, the execution and delivery are the ministerial acts of the officer charged with that duty.
>
> 102 U. S. 378.

"The patent is but evidence of a grant," and to issue it is the performance of a specific definite duty required by law. The language of the act of March 3, 1869, is that the Commissioner of the General Land Office *shall* issue patents for said land in said territory which have heretofore been confirmed by acts of Congress and surveyed and plats of such survey filed in his office, but for which no patents have heretofore been issued. This court has decided that in cases

like this "writs of mandamus and injunction are somewhat correlative to each other."

Chief Justice Marshall in his opinion in the celebrated case of Marbury *vs.* Madison, 1st Cranch 135, makes the following observations upon the nature of a writ of mandamus, he says:

Blackstone in the third volume of his Commentaries, page 110, defines a mandamus to be "A command issuing in the King's name from the court of King's Bench, and directed to any person, corporation, or inferior court of judicature within the King's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of King's Bench has previously determined, or at least supposes, to be consonant to right and justice."

Lord Mansfield in 3d Burrow, 1266, in the case of The King *vs.* Baker etal., states with much precision and explicitness the cases in which this writ may be used.

Wherever there is a writ to execute an office, perform a service or exercise a franchise (more especially if it be a matter of public concern, or attended with profit) and a person is kept out of possession or dispossessed of such right, and has no other specific, legal remedy, this court ought to assist by mandamus, upon reasons of justice, and as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government. This writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. This writ if awarded would be directed to an officer of government, and its mandate to him would, be, to use the words of Blackstone, "to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined, or at least supposes to be consonant to right and justice.

If one of the heads of the departments commits any illegal act under color of his office, by which an individual

sustains an injury, it cannot be contended that his office alone exempts him from being sued in the ordinary mode of proceeding. How then can his office exempt him from this particular mode of deciding of the legality of his conduct if the case be such a case as would were any other individual the party complained of, authorize the process? Where an executive officer is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president could not lawfully forbid, and is, therefore, never presumed to have forbidden; as, for example, to record a commission or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right to be done to the injured individual than if the same services were to be performed by the person not the head of a department.

If the law directs the head of a department to perform an act in regard to which no discretion is committed to him, and which upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires in some degree a construction of its language by the officer.

Roberts *vs.* Valentine, 176 U. S. 222.

A ministerial duty, the performance of which may in proper cases be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple distinct duty, arising under conditions admitted or proved to exist, and imposed by law.

Mississippi *vs.* Johnson, 4 Wall. 475.

The principles upon which the acts of the head of a department may be controlled by the courts, are well and

clearly set forth by this court in Butterworth *vs.* Hoe, 112 U. S. 50.

After discussing the facts the court, on page 66, proceeds to say:

Some question is made as to the remedy. We think, however, that mandamus will lie and that it was properly directed to the Commissioner of Patents. He had fully exercised his judgment and discretion when he decided that the relators were entitled to a patent. The duty to prepare it, to lay it before the Secretary for his signature and to countersign it, were all that remained, and they were all purely ministerial. These duties he had failed and refused to perform merely out of deference to the claim of the Secretary to reverse and set aside the decision on the merits in favor of the relators. This we have held not to be a valid excuse.

A mandamus may issue from this court to compel the execution of a judgment according to its mandate to a lower court. In Perkins *vs.* Fourniquet, 14 Howard 328, this court affirmed a decree rendered by the circut court for the Southern district of Mississippi, and the mandate was sent down accordingly. Process issued from the lower court and the marshal collected what he calculated was due on the affirmed decree, the defendant insisted that the mandate of this court had been misconstrued, and made a motion in the circuit court asking that court in effect to construe the mandate. The court denied the motion, and thereupon the defendant brought the case back to this court by appeal, the object of which was practically to obtain a construction of the mandate. Objection was made in this court that an appeal did not lie; the court said: "This objection to the form of proceeding involves nothing more than a question of practice. The mandate from this court left nothing to the judgment and discretion of the circuit court, but directed it to carry into execution the decree of this court, which was recited in the mandate. And if the decree of this court has been misunderstood or misconstrued by the court below to

the injury of either party we see no valid objection to an appeal to this court in order to have the error corrected. The question is merely as to the form of proceeding which this court should adopt to inforce the execution of its own mandate in the court below. The subject might, without doubt, be brought before us upon motion and a mandamus issue to compel its execution."

To the same effect is The City National Bank *vs.* Hunter, 152 United States, 512.

This court said in the case of The Board of County Commissioners of Labette County, Kansas, *vs* United States, 112 U. S. 217, that the court had jurisdiction to issue the *mandamus* to persons, who are not parties to its judgment against a township, but who are officers of the county and are under a legal duty to take those steps which the law has prescribed as the only mode of providing the means of paying the judgment and that a single writ is all that is necessary to enforce the assessment and the collection of a tax, and that there may be joined in it all those whose co-operation is required by law, even although it be by separate and successive steps in the performance of these official duties which is necessary to secure that end.

The reports of this court, and nearly all the State courts, are replete with similar adjudications.

The rule is laid down in Dunlap *vs.* Black, 128 U. S. 40, that when by special statute or otherwise a ministerial duty is imposed upon an executive officer, which he is bound to perform, without further question, if he refuses, a mandamus may be issued to compel him. But says learned counsel for the appellees: "Two parties, the town of Las Vegas and Marcos Maese and others as original grantees or their representatives applied for patent."

"To ascertain the merits of the claims thus presented required investigation, extending not only to the confirmatory act, but to the report of the Surveyor General referred to in said act, and all the documents accompanying that report.

Can it be said that these acts were merely ministerial?"

Did not the Board of Liquidation of Louisiana have to read and in a sense construe the Funding Act of the legislature of Louisiana, and other of the revenue laws, besides certain provisions of the Constitution of 1870? Did not the tax assessor, the tax collector, and the county commissioners have to look at the tax laws of Kansas, in order to obey the writ of mandamus issued against them? But the writ only compelled them to do what the law without the writ required them to do.

And were there not two persons contending with each other before the Patent Office in the case of Butterworth *vs.* Hoe? In that case Scott was contending with Hoe, and a bitter contest it was, too. Butterworth had to read the law, and from it learn his duty, and then perform it. When he failed to do it the court compelled him to prepare the patent, and submit it to the secretary for his signature.

Were there not two parties contending with each other in Perkins *vs.* Fourniquet? One put one construction on the mandate of this court, the other put a very different construction on it. The question was referred to the United States circuit court for the Southern district of Mississippi, and he construed it, acting judicially, but construed it wrong. This court said the whole question could have been settled by a mandamus from this court. Why? Because the mandate required the performance of a certain, definite, specific act, which was purely ministerial and allowed no discretion to the officers of the circuit court.

Did not Roberts, the U. S. Treasurer, have to examine the act of Congress of 1894, in order to determine whether or not Mrs. Valentine was entitled to the interest she demanded? This court said in reference to the duty of the Treasurer in that case that "There is but one act of Congress to be examined, and it is specially directed to the Treasurer. We think its construction quite plain and unmisakable. It directs the Treasurer to pay the interest on the certificates

which had been redeemed by him, and the only question for him to determine was whether these certificates had been redeemed *within the meaning of the act.*"

But he had to inquire and determine that certain certificates had been paid by him, and if so had they been paid within the meaning of that act, and therefore in a sense had to construe the act of 1894, and yet he was compelled to do the precise thing which that act required him to perform, and in that he had no discretion. So in this case, the Commissioner of the General Land Office must do the specific act required of him by the act of March 3, 1869, namely, issue a patent to the parties entitled thereto, pursuant to the act of June 21, 1860.

III.

THERE IS A FATAL DEFECT OF PARTIES.

The reply to this proposition is simple. The appellants' whole case is based on the theory that the issuing of the patent is purely a ministerial act, and to be such there can be no discretion in the Commissioner of the General Land Office as to whom it shall be issued. The act required of him is a certain, specific, definite one, and unless it is, the appellants have no standing in court.

The law fixes the character of the act to be performed, and of course, the character or nature of the act can not be changed by the views of the officer whose duty it is to perform it, nor by anything that can be done by others. Roberts, the Treasurer, asserted his right of discretion, and decided against Mrs. Valentine, but the court said the law took away from him all discretion, and imposed on him a purely ministerial duty.

There can be no contending adverse beneficiaries of a purely ministerial act, otherwise it would not be ministerial.

IV.

APART FROM THE MATTERS BEFORE DISCUSSED, COMPLAINANTS' CASE IS WITHOUT MERIT.

To sub-division A under the above heading, we do not deem it necessary to make any reply, but will proceed to reply to propositions B and C, which are in effect that the claim "was confirmed to the town of Las Vegas."

In this particular contention the appellees plant themselves on the confirmatory act, and seemingly refuse to look behind it, and herein probably lies their error. They should look at the entire record, and see what it was that Congress confirmed.

Everything subsequent to the grant relates back thereto, and must be interpreted in reference thereto.

In Landes *vs* Brant, 10 How. 384, the court in discussing the effect of the act confirming a Spanish land grant to Clamorgan, said:

In the case of Landes *vs.* Perkins, the Supreme Court of Missouri held that the conclusive legal title vested in Clamorgan by the confirmation of 1811; and that, being the date of the legal title, a court of law could not go behind it; nor did the confirmation, or patent, relate to any previous step taken to acquire title; and the Sheriff's deed, being a mere quit claim, did not estop Clamorgan or his devisees from setting up the legal title against such a deed. And it is intimated that a court of equity could be resorted to, and through its aid the sheriff's sale might be set up by decree.

How far a court of equity would interfere in such a case we are not disposed to inquire, as it is apprehended that the Supreme Court of Missouri was mistaken in the effect it attributed to the confirmation of 1811, and the patent founded on it. Clamorgan's petition asking a confirmation (under the act of 1805) was filed with his title papers with the recorder, and they were recorded (December 10, 1805).

The imperfect title as then filed was subject to seizure and sale by execution: the ultimate perfect title demanded and

granted was a confirmation and sanction by the political power of the imperfect title, and gave it complete legal validity; and to protect purchasers, the rule applies, "that where there are divers acts concurrent to make a conveyance estate, or other thing, the original act shall be preferred; and to this the other acts shall have relation"—as stated in Viner"s Abr., tit. Relation, 290. The doctrine of relation is well illustrated in Jackson *vs.* McMichael, by the Supreme Court of New York, 3 Cowen 75, and recognized by the Supreme Court of Missouri in the case of Crowley *vs.* Wallace, 12 Missouri R. 145.

Cruise on Real Property (Vol. V, pp. 510, 511) lays down the doctrine with great distinctness. He says: "There is no rule better founded in law, reason, and convenience, than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation."

For the purposes of this case (without proposing to apply the rule to every other), we may assume that the first act April 21, 1806, and again by the act of March 3, 1807. As already stated, by the fourth section of this last act, the decision of the Board of Commissioners appointed to investigate such claims is made final against the United States, and he was entitled to a patent. His claim was fully within the provisions of the acts of 1805 and 1807.

Applying the doctrine of relation, and taking all the several parts and ceremonies necessary to complete the title together, "as one act," then the confirmation of 1811 and the patent of 1845, must be taken to relate to the first act—that of filing the claim in 1805.

of Clamorgan was that of filing his title papers and claim with the recorder of land titles, according to the fourth section of the act of March 2, 1805; this was regularly done, and the papers recorded. He claimed under the second section of the act of 1805, which was amended by the act of

In Bissell *vs.* Penrose, 8 Howard 317, the court said:

It has been argued, that the act of 1836 confirms only the Spanish concession in the abstract, without regard to the plat of survey or claimant, if an assignee of the grant. The

act provides, that the decisions in favor of land claimants made by the recorder and the commissioners, under the act of 1832, and the supplemental act of 1833, as entered in the transcript of decisions transmitted by the commissioner to the Commissioner of the Land Office, and by him laid before Congress, be, and the same are hereby confirmed.

Now the transcript of these decisions embraced, as required by the act of 1832, the date and quantity of each claim, and the evidence upon which each depended, together with the authority under which it was granted. The claimant was the party who had filed the claim in the office of the recorder, and had prosecuted it before the Board of Commissioners. His name, of course, appeared—Rudolph Tillier—in the case before us. He represented the interest of one of the sons of Benito Vasquez, in quantity eight hundred arpents. There were four other sons, each of whom was entitled to the same quantity. Tillier procured the private survey of his share, and filed his separate claim for that amount, together with the conveyance from the original grantee, and, under these circumstances, it is insisted that, upon the true construction of the act, the confirmation was in favor of the son, and not of the assignee.

It is certainly difficult to perceive what right or claim the son had, either before the commissioners or Congress, to be confirmed. Having parted with all his interest, he had neither land, nor claim, nor was he a claimant; as that term is regarded as applicable to those only in whose name the claim was filed with the recorder, under the act of 1805. By that act, every person claiming lands, etc., by virtue of any incomplete grant, etc., shall deliver to the recorder a notice, etc., of the nature and extent of his claim; and, also, the grant, order or survey, deed, conveyance, or other written evidence of his claim, to be recorded; providing at the same time in the case of a complete grant, that the claimant need only record the original grant, together with the order of survey and plat; all other conveyances and deeds to be deposited with the recorder; thereby making a distinction between the two cases, as it respects the derivative title; and, in both, clearly contemplating that the assignee might be a claimant.

This is the view taken of the question in the case of Strother *vs.* Lucas, on each occasion when it was before this

court. (6 Peters, 772; 12 Ib. 458.) It was there held that the confirmation was to be deemed to be in favor of the person claiming it. The construction has entered into the usage and practice of the Land Office, as may be seen by the instructions from that office and the opinion of the Attorney General on the subject. (2 Land Laws, 747, 752, and 1043.)

See also Pollard Heirs *vs.* Kibbe, 14 Peters 353.

The appellees have referred to the report of Senate Committee on the bill which became the act of June 21, 1860, and to that the appellants have no objection, for it only goes to strengthen their position. We make the following extract from that report

The second report of the Surveyor General of said territory was communicated to the Senate by the Secretary of the Interior, by letter addressed to the Vice President, under date 3d of February, 1860, and consists of an abstract marked Exhibit A, comprehending nineteen claims, numbered from twenty to thirty-eight, both inclusive.

The bundles of papers containing the copies of the titles, the evidence, and the report of the Surveyor General on each claim separately, have been examined by the committee; and they concur fully in the reports of that officer, recommending the confirmation of all said claims, except that which is numbered twenty-six, in the name of Juan B. Vigil.

What do the committees say they had before them? The papers containing the copies of the TITLES, the *evidence* and the *report* of the Surveyor General on *each* CLAIM separately.

Are there copies of titles to any grant to the town of Las Vegas found in the record?

None at all.

Is there any *evidence* in the record showing that Mexico ever made a grant of land to the town of Las Vegas?

We have examined all the evidence sent up by the Surveyor General, as found in Ex. Doc. No. 14, and there is not a word of reference to the town of Las Vegas.

But did the committee examine the copies of TITLE and

the *evidence;* and, if so, what did the committee say about it?

Yes, they say: "The bundles of papers containing the copies of the *titles,* the *evidence* and the *report* of the Surveyor General on *each claim* separately have been *examined* by the committee, and they *concur* fully in the *reports* of that officer, recommending the *confirmation* of *all said claims,* except that which is numbered twenty-six in the name of Juan B. Vigil."

What was it the committee so fully concurred in?

It was the confirmation of *all said claims,* and, of course, that included the claim for the Las Vegas grant filed by Lopez, Connelly and Gonzales before the Surveyor General.

Lopez, Connelly and Gonzales allege in their petition to the Surveyor General that they and the citizens they represent are the *claimants* and legal owners of the tract. The Surveyor General certifies that the record contains a true copy of the original *claim* or petition. See Ex. Doc. 14, page 17.

In his report he says: The *claim* of Las Vegas is based on the following proceedings:

Ex. Doc., 14, page 44.

The petition of Lopez et al., states that "said grant is filed with this petition."

Ex. Doc. 14, page 16.

The Surveyor General in his report to Congress, after reciting that "the claim of Las Vegas is based on the following proceedings," and then setting out the petition of Juan de Dios Maese et al., on page 44, of Ex. Doc. 14, referring to the contest between the Baca heirs and the claimants under the grant to Juan de Dios Maese, says: "Conflicting *claims* between parties should be adjudicated before the proper tribunals of the country having jurisdiction in the premises.

"Under this view of the case, it will not be necessary to refer to any other points made by counsel than those touching the sufficiency of the *titles* given, and under which the respective parties *claim.*"

Is there or can there be any doubt to whom the Surveyor General referred when he thus spoke of "the respective parties" who made claim to this land? Had any parties asserted before him a *claim* to this land, except the Baca heirs and Lopez, Connelly and Gonzales, for themselves and the citnzens whom they represented?

There can be no doubt about this matter. The *claimants* are distinctly declared to be the Baca heirs, on one side, and Lopez et al., representing the original grantees under the grant of March 23, 1835, on the other, and it was their respective *claims* that he investigated, and adjudicated, and recommended to Congress for approval, and when the Senate Committe reported that "they *fully concur* in the *reports* of that officer, recommending the confirmation of all of said *claims*," they concurred in the conifirmation of the claim preferred by Lopez et al.

Section 3, of the conifirmatory act, is as follows:

"Sec. 3. And it be further enacted, that the private land *claims* in the territory of New Mexico, as recommended for confirmation by said Surveyor General in his reports and abstract, marked 'Exhibit A,' as communicated to Congress by the Secretary of the Interior in his letter dated the third of February, eigheen hundred and sixty, and numbered from twenty to thirty-eight, both inclusive, be and the same are hereby confirmed, with the exception of the claim numbered twenty-six, in the name of Juan B. Vigil, which claim, numbered twenty-six is not confirmed."

What was it Congress confirmed?

The private land *claims*, as recommended for confirmation by the Surveyor General,

The claim filed by Lopez and others before the Surveyor General was based on and accompanied by the original title papers or grant, and that is the first of the concurrent acts to which the office should look in proceeding to issue the patent; the next is the report of the Surveyor general and the last is the confirmatory act, the last two relating back to the first, which is the controlling one.

Landes *vs.* Brant, *supra.*

D. Confirmatory patent must follow act of confirmation. Neither Land Department nor courts can revise action of Congress.

That is a correct statement of the law, and upon it appellants stand. The patent must follow the confirmatory act, and all that is included in the act. It is not supposed that any one will deny that included in the confirmatory act is the claim presented by Lopez and others, and the report of the Surveyor General thereon. They are as much a part of the act as if they had been actually written therein.

THE ESTABLISHER PRACTICE OF ISSUING PATENTS.

We will not attempt to cite all the numerous cases that have been passed upon by this court in which the patents were issued to the parties who presented the claims, but will refer to a few. We can find no exception to the general rule. The patents were thus issued in Grignon *vs.* Astor, 2 How. 319; Stoddard *vs.* Chambers, 2 How. 284; Landes *vs.* Brant, 10 How. 348; Easton *vs.* Salisbury, 21 How. 426; Morrison *vs.* Jackson, 92 U. S. 315; U. S. *vs.* Maxwell Land Grant, 121 U. S. 325; Tameling *vs.* U. S. Freehold, 93 U. S. 644; Chavez *vs.* United States, 168 U. S. 179; Bissell *vs.* Penrose, 8 How. 317; United States *vs.* Grimes, 2 Black. 610; Carpenter *vs.* Rannells, 19 Wall. 138; Connoyer *vs.* Schaeffer, 22 Wall. 261.

The Land Department has, as shown in our original brief, followed this long established practice in reference to all the private land claims confirmed by the act of June 21, 1860, except that of the Las Vegas claimants.

In the Anton Chico claim, the report of which is found on page 144 of Ex. Doc. 14, and which is one of the claims confirmed by the act of June 21, 1860, the Surveyor General's report is found on pp. 150 and 151, and is headed:

"Town of Anton Chico *vs.* The United States," and concludes thus:

The grant made by Melgares on the 2d of May, 1822, severed the land from the public domain and placed it beyond the further reach and control of the Government. The

instructions to this office provides that the *existence of a town* when the United States took possession of the country being proven, is to be taken as *prima facie evidence of a grant to said town*, and as it is proven to have been in existence in 1839, and up to 1846, with the knowledge and tacit consent of the Mexican Government, and *was recognized as a town by that Government*, it is believed to be a good and valid grant and the land claimed severed from the public domain. It is therefore approved and ordered to be transmitted to Congress for its action in the premises.

Note the wording of this approval; it much more strongly indicates an approval of the grant to the town than the language employed in the approval of the Las Vegas grant. There is no direct approval in *haec verba* to any one. "It is believed to be a good and valid grant, and the land claimed severed from the public domain. It is therefore approved," but to whom is not stated. The failure to state to whom it was approved caused the same character of litigation as in the case at bar, and was adjudicated by the Land Department February 19, 1883. See 1 L. D., 287, where it is said:

I have considered the matter of the land claim known as Anton Chico, Santa Fe district, New Mexico, on appeal, alleged to have been presented in behalf of the claimants under Manuel Rivera from your decision of August 10, 1881, holding that confirmation is to the "town of Anton Chico," and that patent should so run.

The record shows that the claim was presented to the United States Surveyor General of New Mexico, in accordance with the provisions of the eighth section of the act of Congress, approved July 22, 1854 (10 Stat., 309), and was finally reported by him to Congress, and thereby confirmed as No. 29 by the third section of the act of June 21, 1860. (12 Stat., 71.)

I am of the opinion that substantial justice would be done to all parties in interest by following the terms of the grant or judgment recorded, rather than by having regard to the mere style of the case or description of the papers therein, and that patent should issue accordingly, citing the grant as in terms following: "To Manuel Rivera and others, being the thirty-six men to whom the grant was made by Facunda Nulgares, Governor, May 2, 1822, their children, heirs, successors and assigns, as in said grant provided, and which

was confirmed as private land claim No. 29, by act of Congress, entitled "An act to confirm certain private land claims in the Territory of New Mexico," approved June 21, 1860, subject to all the provisions and conditions mentioned and set forth in the decree granting said tract of land as aforesaid, and the record of juridical possession and other documents accompanying the same, and made part of the report of William Pelham, Surveyor General of New Mexico, on the 15th of July, 1859, and to the rights of all persons claiming under said provisions and conditions.

Your decision is accordingly reversed."

When subsequent to that the claim of the town of Tecalote came before the Land Department for patent, it was insisted that the patent should be issued in that case, as was the patent in the Anton Chico case, but the department said "an examination of that case shows that said claim was confirmed as No. 29 by the third section of the act of Congress, approved June 21, 1860, which materially differs from the act confirming the Tecalote grant." (5 Land Decisions 61.) The Tecaloto grant was held to have been confirmed as a town grant, which it was, while that of Las Vegas was confirmed as a private land, or colonization grant.

The title of the act, confirming the Tecalote grant is as follows:

"An act to confirm the land claims of certain pueblos and towns in the Territory of New Mexico." (11 Stats. 374.)

The title of the act confirming the Las Vegas grant is as follows:

"An act to confirm certain private land claims in the Territory of New Mexico." (12 Stats. 71.)

The decision of the Secretary of the Interior in the Tecalote grant case shows that the department as late as April, 1892, the date of that decision, recognized the correctness of appellants' position in this case.

All that the appellants ask is that the Land Department be required to obey the law and to follow its directions in the Las Vegas case, as it has done in all other grants confirmed by the act of June 21, 1860.

Respectfully submitted,

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